

## **SERIES OF ARTICLES FOR MUNICIPAL JOURNAL ON SHARED SERVICES.**

### **ARTICLE 3 - PUBLIC PROCUREMENT IMPLICATIONS OF SHARED SERVICE ARRANGEMENTS**

**By Professor John Bennett**

This article is the third in the series on shared services for local authorities and focuses on the key area of the procurement implications.

If one local authority decides that the best way it can obtain architectural services is to purchase them from another local authority that this is likely to trigger the requirements of the public procurement regime. This is because any contractual arrangements, even those between local authorities, which relate to those services where there is likely to be a significant cross border interest will fall within the Public Contracts Regulations 2006 (SI 2006/05), if they exceed £144,371 in value. Architectural services feature in Schedule 3A which triggers the requirement for full compliance with the public procurement regime.

In practice however, most inter-authority arrangements are of much lower value. Others will relate to a group of services listed in Schedule 3B of the 2006 regulations which have lesser obligations. As an example, legal services and social services are two of the ten categories of services where there has been little interest in cross-border trade and therefore fall outside the detailed obligations set out in the 2006 regulations.

The advantage of an arrangement falling outside of the detailed rules in the 2006 regulations; is that those regulations require prior advertising and a detailed competition. If this is not the case, then it would effectively prevent agreed arrangements between local authorities; as the supplying local authority would have to win the work in a public competition.

However, in the case of *Telaustria* (Case C-324/03), the ECJ indicated that even where a contract was expressly exempted from the detailed requirement of the public procurement directives, that the EC Treaty itself would impose two important requirements, namely, a sufficient degree of prior public advertising; and sufficient transparency to enable the impartiality of the procurement procedure to be reviewed. It should be noted that two other important cases are pending before

the ECJ. If these two cases are decided the way predicted then a proportionate degree of prior public advertising is likely to be required for all public sector contracts over a “de-minimis” level.

Where does this leave authorities wishing to undertake shared service arrangements? There are probably two avenues worthy of further investigation and which may allow negotiated arrangements without prior public advertising. The first is the use of administrative rather than contractual arrangements; the second is the use of a case law exemption relating to in-house companies (*Teckal*).

The public procurement regime is triggered by the desire of a public body to award a contract, raising the spectre that non contractual arrangements will side-step the regime. Unfortunately, the ECJ has taken a narrow view of this exemption and in the case of *Commission v Spain* (Case C-84/03), upheld a complaint against the Spanish government which had tried to exempt all co-operation agreements within the public sector from its national regulations governing procurement, pointing out that these agreements could be contractual in nature and as such governed by the regime.

In the UK, use of a delegation arrangement (under s101 of the Local Government Act 1972), should fall outside of the regime as being purely of an administrative nature or covered by an express exemption in regulation 6(2)(l) of the 2006 regulations; but many other so called “administrative arrangements” are in truth contracts which would be governed by that regime.

The other avenue which has been opened up for investigation is the use of a shared company. Yet another case, *Teckal* (Case C-107/98), has established that where a local authority or a small group of authorities set up a company and that company behaves just like an in-house unit of the authority (rather than in an arm’s length manner) then contracts with the company fall outside of the public procurement regime. This is because in-house arrangements within the same legal entity are not contractual in nature (even if governed by Service Level Agreements) and are therefore not the proper subject of the regime. Further case law has clarified the narrowness of the *Teckal* exemption; but as the law stands today it would seem that a properly constructed company could assist authorities in shared service arrangements.

This is explored in the next article in the series.

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